

## CCRB INVESTIGATIVE RECOMMENDATION

|  |   |                               |   |   |                                 |
|--|---|-------------------------------|---|---|---------------------------------|
| Investigator:<br>Benjamin Shelton                | Team:<br>Squad #11                        | CCRB Case #:<br>201910097     | <input checked="" type="checkbox"/> Force             | <input checked="" type="checkbox"/> Discourt. | <input type="checkbox"/> U.S.   |
|  |   |                               | <input checked="" type="checkbox"/> Abuse             | <input checked="" type="checkbox"/> O.L.      | <input type="checkbox"/> Injury |
| Incident Date(s)<br>Tuesday, 07/30/2019 11:29 AM | Location of Incident:<br>445 Albee Square | 18 Mo. SOL<br>9/16/2021       | Precinct:<br>84                                       |   |                                 |
| Date/Time CV Reported<br>Wed, 11/20/2019 3:18 PM | CV Reported At:<br>CCRB                   | How CV Reported:<br>In-person | Date/Time Received at CCRB<br>Wed, 11/20/2019 3:18 PM |   |                                 |

| Complainant/Victim | Type | Home Address |
|--------------------|------|--------------|
|                    |      |              |

| Witness(es) | Home Address |
|-------------|--------------|
|             |              |
|             |              |
|             |              |

| Subject Officer(s)     | Shield | TaxID  | Command |
|------------------------|--------|--------|---------|
| 1. POM Michael Gargano | 24508  | 938534 | 084 PCT |
| 2. POF Sorely Nunez    | 08976  | 957907 | 084 PCT |

| Witness Officer(s)      | Shield No | Tax No | Cmd Name |
|-------------------------|-----------|--------|----------|
| 1. POM Steven Merslich  | 27149     | 960939 | 084 PCT  |
| 2. POM Matthew Wong     | 12373     | 966398 | 084 PCT  |
| 3. POM Mauricio Fuentes | 05560     | 966069 | 084 PCT  |

| Officer(s)              | Allegation   | Investigator Recommendation |
|-------------------------|--|-----------------------------|
| A . POM Michael Gargano | Discourtesy: Police Officer Michael Gargano spoke discourteously to § 87(2)(b)                               |                             |
| B . POF Sorely Nunez    | Abuse: Police Officer Sorely Nunez threatened to remove § 87(2)(b) to the hospital.                          |                             |
| C . POM Michael Gargano | Force: Police Officer Michael Gargano hit § 87(2)(b) against a window.                                       |                             |
| D . POF Sorely Nunez    | Force: Police Officer Sorely Nunez hit § 87(2)(b) against a window.  |                             |
| E . POM Michael Gargano | Force: Police Officer Michael Gargano used physical force against § 87(2)(b)                                 |                             |
| F . POF Sorely Nunez    | Force: Police Officer Sorely Nunez used physical force against § 87(2)(b)                                    |                             |
| G . POM Michael Gargano | Abuse: Police Officer Michael Gargano threatened to remove § 87(2)(b) to the hospital.                       |                             |
| H . POF Sorely Nunez    | Discourtesy: Police Officer Sorely Nunez spoke discourteously to § 87(2)(b)                                  |                             |
| I . POF Sorely Nunez    | Discourtesy: Police Officer Sorely Nunez spoke discourteously to § 87(2)(b)                                  |                             |
| J . POF Sorely Nunez    | Off. Language: Police Officer Sorely Nunez made remarks to § 87(2)(b) based upon her perceived mental state. |                             |
| K . POF Sorely Nunez    | Discourtesy: Police Officer Sorely Nunez spoke discourteously to § 87(2)(b)                                  |                             |

| Officer(s)              | Allegation   | Investigator Recommendation |
|-------------------------|--|-----------------------------|
| L . POM Michael Gargano | Discourtesy: Police Officer Michael Gargano spoke discourteously to § 87(2)(b) |                             |

### Case Summary

On November 20, 2019, § 87(2)(b) filed the following complaint with the CCRB from Rikers Island via Video Teleconference.

On July 30, 2019, at approximately 11:29 a.m., § 87(2)(b) attempted to shoplift from a Target store located at 445 Albee Square in Brooklyn and was removed from the store by security personnel. After being ejected, she returned to the store and engaged in a verbal dispute with staff about the whereabouts of her cellphone. As a result, PO Michael Gargano and PO Sorely Nunez of the 84<sup>th</sup> Precinct arrived on scene. As § 87(2)(b) handled her belongings, PO Gargano told her not to “fucking throw shit” (**Allegation A: Discourtesy**, § 87(2)(g)). PO Nunez threatened to take § 87(2)(b) to the hospital (**Allegation B: Abuse of Authority**, § 87(2)(g)). PO Gargano and PO Nunez allegedly pushed § 87(2)(b) against a large plate glass window and took her to the ground where they handcuffed her (**Allegations C to F: Force**, § 87(2)(g)). PO Gargano threatened to take § 87(2)(b) to the hospital (**Allegation G: Abuse of Authority**, § 87(2)(g)). PO Nunez told § 87(2)(b) “Calm the fuck down... You tried to fucking punch me, are you crazy?” asking additional times whether she was “crazy” (**Allegation H: Discourtesy**, § 87(2)(g)). (**Allegation I: Discourtesy**, § 87(2)(g)) (**Allegation J: Offensive Language**, § 87(2)(g)). PO Nunez also told § 87(2)(b) to “sit the fuck down,” and that she “threw shit,” and PO Gargano told her, “Now you fucked up good. You fucked up good,” that she threw “shit,” and wanted to “start shit up” (**Allegations K and L: Discourtesy**, § 87(2)(g)). PO Gargano and PO Nunez arrested § 87(2)(b) and she was transported to the 84<sup>th</sup> Precinct stationhouse.

§ 87(2)(b) was arrested and charged with resisting arrest, obstructing governmental administration in the second degree, criminal possession of a controlled substance in the seventh degree, trespass, and disorderly conduct for fighting and violent behavior (BR 01).

The investigation received body-worn camera (BWC) footage from the NYPD’s Legal Bureau recorded by the following 84<sup>th</sup> Precinct officers: PO Gargano, PO Nunez, PO Steven Merslich, PO Matthew Wong, and PO Mauricio Fuentes (BR 02-07).

### Findings and Recommendations

#### **Allegation A – Discourtesy: Police Officer Michael Gargano spoke discourteously to § 87(2)(b).**

Footage from PO Gargano’s BWC depicts this allegation (BR 02). The durational timestamps of the footage will be referenced, not the onscreen timestamps. From 1:15 to 2:35, PO Gargano and PO Nunez confirm with Target security staff that § 87(2)(b) had shoplifted earlier and listened to § 87(2)(b) accuse the staff of taking her phone. § 87(2)(b) sits on a radiator in front of a plate glass window. At 2:50, § 87(2)(b) grabs some belongings by her feet, just off the bottom of the frame, and begins to speak more quickly and loudly. It is not clear whether she throws any belongings. At 2:52, PO Gargano states, “Don’t fucking throw shit.” § 87(2)(b) stands up.

§ 87(2)(b) did not testify to this allegation (BR 08). After she was caught shoplifting at the Target and was ejected by security staff, she returned to the store and accused employees of taking her cellphone. When § 87(2)(b) refused to leave without her cellphone, security staff called 911 and officers arrived. She did not describe herself throwing any of her belongings or exhibiting any physical or verbal aggression toward officers or Target employees during their interaction.

§ 87(2)(b), § 87(2)(b), and § 87(2)(b) all testified that they worked for Target security and were present for this allegation (BR 09-11). All witnesses described § 87(2)(b) as agitated and loud when speaking to officers and that she used profanity, but she never became physically aggressive. § 87(2)(b) and § 87(2)(b) described § 87(2)(b) as gesticulating with her arms throughout. § 87(2)(b) stated § 87(2)(b) emptied her bag to show officers she did not have her phone and did not throw any objects around, though § 87(2)(b) and § 87(2)(b)

did not recall § 87(2)(b) doing so. No witness recalled PO Gargano telling § 87(2)(b) to not “fucking throw shit.”

PO Gargano stated that after he and PO Nunez spoke to Target employees and § 87(2)(b) who all agreed she had been caught shoplifting, § 87(2)(b) was adamant staff had her cellphone but did not observe anyone steal it (BR 12). § 87(2)(b) gesticulated in an agitated manner around her torso and head and stomped her feet as she spoke. § 87(2)(b) used profanity generally and it did not seem directed to offend anyone. The officers told § 87(2)(b) she had to observe the robbery to accuse someone, and police could not do anything based on assumptions. § 87(2)(b) seemed to have trouble understanding, which caused her to become more agitated and move her body more. She cursed at officers and Target security. She did not make or present any threats. The officers instructed her to leave at least twice, but she refused. She continued to yell that she would not leave until she recovered her phone. § 87(2)(b) sat throughout this initial interaction, with a bag near her person. He did not recall her throw or empty the bag at all. PO Gargano did not recall telling § 87(2)(b) not to “fucking throw shit” or using any profanity at this point of the incident. When presented the above-referenced footage, he identified himself as telling § 87(2)(b) to not, “fucking throw shit,” and could not provide a reason for his use of profanity. He stated it appeared that § 87(2)(b) was throwing objects from her bag onto the floor.

PO Nunez provided consistent testimony to PO Gargano barring the following points (BR 13). PO Nunez recalled neither § 87(2)(b) initial physical behavior nor if § 87(2)(b) yelled generally or at anyone. PO Nunez did not recall § 87(2)(b) verbally threatening anyone on scene. § 87(2)(b) had a purse with her. § 87(2)(b) threw a bottle or other container she could not describe in any further detail on the floor directly in front of officers.

Officers are committed to treating every citizen with compassion, courtesy, professionalism, and respect per NYPD Patrol Guide Procedure 200-02 (BR 14). Discourteous language by an officer may also be justified when attempting to gain compliance with an order while attempting to maintain order during a stressful street encounter NYPD Disciplinary Case #79627/04 (BR 16).

Though PO Gargano did not recall this allegation, he identified himself in the video evidence as using profanity and could not provide any reason for doing so. § 87(2)(g)

§ 87(2)(g)

**Allegation B – Abuse of Authority: Police Officer Sorely Nunez threatened to remove § 87(2)(b) to the hospital.**

**Allegation G – Abuse of Authority: Police Officer Michael Gargano threatened to remove § 87(2)(b) to the hospital.**

Footage from PO Nunez’s and PO Gargano’s BWC depicts both these allegations at the same timestamps (BR 02-03). The durational timestamps of the footage will be referenced, not the onscreen timestamps. From 1:15 to 2:50, § 87(2)(b) speaks while seated on the radiator with slurred and rapid speech which renders her incomprehensible at multiple points, but it is clear she accuses Target staff of taking her phone. PO Nunez tells § 87(2)(b) they are not going to make a report for the missing cellphone. At 2:50, PO Gargano states, “Don’t fucking throw shit,” and § 87(2)(b) stands up and appears to handle her belongings off the bottom of the frame. It is not clear if she throws anything. § 87(2)(b) tells officers, “I am making a report [incomprehensible], arrest me and then we both get arrested.” § 87(2)(b) uses her hands to gesticulate throughout the video as she speaks. PO Nunez tells her she is going to the hospital. PO Nunez and PO Gargano proceed to handcuff § 87(2)(b). At 3:17, PO Gargano tells PO Nunez to call an ambulance for an emotionally disturbed person (“EDP”) and PO Nunez requests over the radio an ambulance for an EDP. At

10:10, PO Gargano tells PO Nunez to cancel the ambulance because § 87(2)(b) is going to the stationhouse.

§ 87(2)(b) only recalled officers discussing taking her to the hospital after she was handcuffed. She described six to seven officers arriving on scene together. Prior to her handcuffing, § 87(2)(b) stated she only told officers she wanted to make a report to make sure that, if her phone was lost, that it would be returned to her. Officers told her to leave and § 87(2)(b) continued to try and document her information before they began to handcuff her. Afterward, all six to seven officers discussed whether they should bring her to the hospital due to her being loud and boisterous. § 87(2)(b) told them she did not need to go to the hospital. After approximately 15 minutes, she was arrested. § 87(2)(b) stated her memory of the incident was incomplete. She could not recall if she was transported to the hospital or not, but believed she was not and was only transported to the 84<sup>th</sup> Precinct stationhouse.

§ 87(2)(b), § 87(2)(b) and § 87(2)(b) all provided consistent testimony regarding this allegation except where noted. After Target staff and § 87(2)(b) explained to officers what had happened prior to their arrival, PO Gargano and PO Nunez told § 87(2)(b) to leave multiple times. § 87(2)(b) refused, explaining she would not leave without her cellphone. § 87(2)(b) told officers she was not going anywhere until she got her phone back. § 87(2)(b) yelled with an angry and upset tone and gesticulated by moving her arms around her torso her arms. She was not physically aggressive as she sat on the radiator. § 87(2)(b) had a bag but § 87(2)(b) and § 87(2)(b) did not observe or recall her throwing her possessions.

PO Gargano stated that upon his arrival at the incident location § 87(2)(b) was yelling, “They stole my phone, they stole my phone.” Officers spoke to Target staff first, learning that § 87(2)(b) had shoplifted, been caught and trespassed (a signed affidavit agreeing to not come back subject to arrest) and then soon returned and accused employees of taking her phone when they recovered the merchandise she had placed on her person. He did not recall any verbal aggression or physical aggression described by employees. When PO Gargano and PO Nunez spoke to § 87(2)(b) she did not refute the allegations against her, but she was adamant that employees had taken her phone. She yelled and gesticulated in an agitated manner around her torso and head as she spoke and stomped her feet. § 87(2)(b) cursed in general and did not seem to target profanity at anyone. Officers told § 87(2)(b) she had to observe the robbery to make such accusation and police could not do anything based on assumptions. § 87(2)(b) seemed to have trouble understanding, which caused her to become more agitated and move her body more. She cursed directly at officers and Target staff. She did not make or present any threats. Officers instructed her to leave at least twice. § 87(2)(b) refused and yelled that she would not leave until she recovered her phone. § 87(2)(b) did not verbally or physically threaten anyone. After telling § 87(2)(b) to leave, PO Gargano and PO Nunez took a step toward § 87(2)(b) to physically guide her out of the building without arrest. He observed no need to bring her to the hospital. § 87(2)(b) continued yelling, stomping her feet and gesticulating. She resisted officers’ physical guidance by flailing her arms and when officers were within arms’ length, § 87(2)(b) swung her right arm and tried to punch PO Nunez in the face with a closed fist. The punch may have grazed PO Nunez but there was no significant contact. Officers then placed her under arrest. PO Gargano did not recall himself or PO Nunez ever mentioning the need for medical attention or an ambulance for § 87(2)(b). PO Gargano never saw any reason to take § 87(2)(b) to the hospital as he did not ever consider her to be emotionally disturbed. When presented the Event related to the incident, PO Gargano could not recall or explain why EMS was called and then later cancelled by his unit, or why an “EDP” or emotionally disturbed person was described. When presented the above-referenced footage, he identified himself as telling PO Nunez to call EMS for an emotionally disturbed person. He did not recall why he did so, but possibly because she was being unruly. He also heard himself tell PO Nunez to cancel EMS but still did not remember it.

PO Nunez stated that upon her arrival on scene, § 87(2)(b) was yelling statements that did not make sense. She did not recall if § 87(2)(b) yelled generally or at anyone. PO Nunez did not

recall specific statements by § 87(2)(b). PO Nunez did not recall § 87(2)(b) initial behavior or her verbally threatening anyone on scene. PO Nunez and PO Gargano told § 87(2)(b) to leave. § 87(2)(b) did not and spoke over officers and did not respond directly to officers' statements. She threw a bottle or other container which PO Nunez could not describe on the floor directly in front of officers' feet. PO Nunez started to handcuff § 87(2)(b) for officers' safety and hers. PO Nunez did not know what state of mind § 87(2)(b) was in due to her agitation and did not want her to hurt herself. § 87(2)(b) throwing things presented the only physical risk to herself and officers besides general ambiguity surrounding her mental state. § 87(2)(b) extended her right arm and swung her hand toward PO Nunez's face. The proximity to PO Nunez's face made her believe it was an intentional attempt to strike by § 87(2)(b). She recalled no other physical aggression by § 87(2)(b). PO Nunez and PO Gargano handcuffed § 87(2)(b). PO Nunez did not recall either officer tell § 87(2)(b) that she was going to the hospital, but officers intended to bring § 87(2)(b) to the hospital prior to handcuffing her. PO Nunez did not recall at what point she believed she might need psychiatric assessment but did so because § 87(2)(b) threw her belonging on the ground and because she was not listening to officers or making sense. PO Nunez believed an ambulance was requested then cancelled by an officer she did not recall because they eventually decided to arrest § 87(2)(b) for trying to assault an officer. She could not say or specify any point in the interaction when the request and subsequent cancellation occurred. PO Nunez stopped believing that § 87(2)(b) was an emotionally disturbed when she tried to punch her in the face. When presented the above-referenced footage, PO Nunez heard herself tell § 87(2)(b) she was going to the hospital. PO Nunez stated this was the point when she intended to bring § 87(2)(b) to the hospital without arrest but her recollection was unchanged. She identified PO Gargano telling her to call EMS for an emotionally disturbed person. She did not know why he did so. PO Nunez called for EMS due to PO Gargano's directive and the behavior by § 87(2)(b) she described earlier. She heard her and PO Gargano cancel EMS as it was now an arrest. After § 87(2)(b) was handcuffed, PO Nunez saw no need for her to go to the hospital.

The Event associated with this incident, #§ 87(2)(b) shows PO Gargano's and PO Nunez's unit requesting EMS for an EDP at 11:16 a.m. and then cancelling it at 11:22 a.m. (BR 17).

By NYPD guidelines, an emotionally disturbed person appears to be mentally ill or temporarily deranged and is conducting themselves in a manner which a police officer reasonably believes is likely to result in serious injury to himself or others and must remove them to a hospital by ambulance NYPD Patrol Guide Procedure 221-13 (BR 21).

No party disputed that § 87(2)(b) was acting agitated and non-compliant. It is disputed whether she threw any of her belongings on the ground or intentionally attempted to punch PO Nunez, but neither presented a threat of serious injury to anyone on scene. While attempting to strike an officer is an arrestable offense for which § 87(2)(b) was charged in this incident, not necessarily grounds for psychiatric hospitalization. PO Nunez is the only party to describe § 87(2)(b) as lacking sense in her statements or acting potentially mentally ill and PO Gargano stated he never considered § 87(2)(b) to be emotionally disturbed. § 87(2)(g)

§ 87(2)(g)

**Allegation C – Force: Police Officer Michael Gargano hit § 87(2)(b) against a window**

**Allegation D – Force: Police Officer Sorely Nunez hit § 87(2)(b) against a window.**

**Allegation E – Force: Police Officer Michael Gargano used physical force against § 87(2)(b).**

**Allegation F – Force: Police Officer Sorely Nunez used physical force against § 87(2)(b)**

Footage from PO Nunez's and PO Gargano's BWC depicts both these allegations at the same timestamps (BR 02-03). The durational timestamps of the footage will be referenced, not the



onscreen timestamps. At 2:54, PO Nunez grabs § 87(2)(b) right arm with two hands and PO Gargano grabs her left arm with one hand. § 87(2)(b) stands with her back within a few feet of a wall with both officers in front of her. PO Gargano states, "Turn around and put your hands behind your back." § 87(2)(b) moves backwards and her back comes into contact with a wall. She flails her arms in various directions and it is not clear if she attempts to strike PO Nunez. Officers cannot maintain their grasps on § 87(2)(b) arms and continue to try and grab them. Still with her back on the wall, § 87(2)(b) appears to try and keep moving away from officers. At 3:02, § 87(2)(b) moves forward onto the ground, landing on her stomach. It is unclear exactly how she moved to the ground, but it appears PO Gargano pulled or guided her as he appears to still be holding her left upper arm, now with two hands. He tells § 87(2)(b) to put her hands behind her back as she flails her body on the ground. He then places his right hand on her back, apparently forcing her upper body to remain on the ground. At 3:09, PO Nunez moves toward § 87(2)(b) and places § 87(2)(b) right hand behind her back. From 3:14 to 3:25, PO Gargano and PO Nunez hold both her arms as PO Gargano secures handcuffs.

§ 87(2)(b) testified that she stood directly next to the large plate glass window, next to the entrance to the Target, when officers told her they could do nothing about her stolen cellphone. As she repeatedly asked officers to take down her information in case, they found her phone, PO Nunez and two of the other five to six officers pushed her toward the window. § 87(2)(b) attempted to defend herself by extending one of her arms away from her body, her hand with an open palm away from her body to brace herself against the window. § 87(2)(b) collided with the window and she slid down to sit on a metal ledge. PO Nunez accused § 87(2)(b) of swinging at her. § 87(2)(b) denied this and did nothing with her hands but attempt to brace herself from hitting the wall. She did not recall hitting anyone. As § 87(2)(b) started to stand up, the same three officers pressed on her back downward until she was forced onto her stomach. Two officers then grabbed her hands and pulled them high up behind her back before they handcuffed her. § 87(2)(b) denied doing anything physical to resist officers' actions.

§ 87(2)(b) faced away from officers and § 87(2)(b) focused on crowd control in the area in front of the Target, when he heard PO Nunez accuse § 87(2)(b) of putting her hands on her. § 87(2)(b) saw § 87(2)(b) on the ground, with both officers holding her on the floor. He did not recall how § 87(2)(b) was positioned on the ground and did not see § 87(2)(b) become physically aggressive with any officers or how she got to the ground. Officers placed her in handcuffs, and she resisted but he could not describe it in any further detail. PO Gargano repeatedly told § 87(2)(b) "Hey, you don't touch her," apparently referring to PO Nunez.

§ 87(2)(b) stated that after § 87(2)(b) refused to leave the vicinity of the Target, officers told her to turn around so they could arrest her. PO Gargano and PO Nunez both began generally grabbing her and trying to turn her around. § 87(2)(b) started moving and flailing her arms around seemingly to avoid the officers' grasps. § 87(2)(b) did not see § 87(2)(b) hit an officer but it was likely due to her flailing arms. § 87(2)(b) did not recall any officer push § 87(2)(b) but stated she and officers collided with the window due to the general struggle in immediate proximity of the window. She did not believe officers ever intentionally hit or push her against any wall or window. § 87(2)(b) recollection of the exact physicality was hazy, but stated PO Gargano, PO Nunez, and § 87(2)(b) ended up on the ground during the arrest. One or both officers held § 87(2)(b) by her upper body and forced her to the floor with their respective grasps on her. § 87(2)(b) could not be more specific about how officers brought § 87(2)(b) to the ground but believed they did so because they could not handcuff her from a standing position. § 87(2)(b) was on her stomach and continued moving her arms and body around to resist being handcuffed. PO Gargano and PO Nunez grabbed § 87(2)(b) arms, placed them behind her back and secured handcuffs on her. One officer placed their knee on her torso while handcuffs were secured, and § 87(2)(b) believed this pinning of § 87(2)(b) with a knee enabled officers to control her movements and place handcuffs on her. Once § 87(2)(b) was under control and handcuffed, the officer removed their knee from her back.

§ 87(2)(b) returned to the store after officers arrived and she did not observe any physical interaction between § 87(2)(b) and the officers.

PO Gargano stated he and PO Nunez instructed § 87(2)(b) to leave at least twice. § 87(2)(b) refused so PO Gargano and PO Nunez both took a step toward § 87(2)(b) to physically guide her out of the building. She stood up and PO Gargano reached toward her left bicep with his right hand to escort her out of the mall. § 87(2)(b) continued yelling, stomping her feet and gesticulating. As he attempted to grab her, she swatted PO Gargano's hand away and flailed her arms around her body. Officers stepped forward again and § 87(2)(b) stepped back into a corner near the window. PO Gargano was on § 87(2)(b) left and PO Nunez on her right. When officers were within arms' length, § 87(2)(b) swung her right arm and tried to punch PO Nunez in the face with a closed fist. PO Gargano differentiated the punch from gesticulation as § 87(2)(b) was not speaking and she directed it toward PO Nunez's face. The punch may have grazed PO Nunez but there was no significant contact. As § 87(2)(b) moved herself into the corner, her back came up against the window. No officer pushed her or forced her into the wall or window. With § 87(2)(b) attention on PO Nunez, PO Gargano grabbed her left upper arm with one hand and one hand on the back of her left shoulder. He pivoted his body to his left and pulled her to the floor on the front of her body. He maintained his grasp on her throughout. He placed himself on the ground and put his knee on her lower back to maintain control of her body. PO Nunez did not use any force at this point. PO Gargano intentionally placed § 87(2)(b) on the ground to arrest her for trying to assault PO Nunez. This gave officers a better position to handcuff her given her physical resistance and aggression to minimize those behaviors. PO Gargano released his grasp and grabbed his handcuffs. § 87(2)(b) still moved her arms in various directions away from her body. PO Gargano grabbed her left arm and PO Nunez, who had crouched down, grabbed her right arm near the wrists and they placed her hands behind her back to secure his handcuffs on her.

During his interview PO Gargano reviewed § 87(2)(b) arrest report that he prepared in which it was indicated in the narrative that § 87(2)(b) tried to punch PO Gargano. He stated it was a typographical error. PO Gargano did not initially recall preparing a Threat, Resistance, or Injury incident report (TRI) but when presented his handwritten TRI, he confirmed it as his own. In the digital version, it was indicated § 87(2)(b) used no force and PO Gargano explained it indicated no force was used against himself. He explained he used a takedown to defend himself to prevent any potential punching against himself, which was likely due to § 87(2)(b) trying to punch his partner (BR 22-23).

PO Nunez stated that after officers told § 87(2)(b) to leave, she threw a bottle or other container PO Nunez could not describe on the floor directly in front of officers' feet. At this point, both officers stood face-to-face with § 87(2)(b) near a window. PO Nunez started to handcuff § 87(2)(b) for her and officers' safety. § 87(2)(b) throwing things presented the only physical risk. PO Gargano also moved toward and both officers tried grabbing one of § 87(2)(b) arms. § 87(2)(b) extended her right arm and swung her hand toward PO Nunez's face. It came within inches of PO Nunez's face. She did not recall if it was a closed fist. PO Nunez used one of her own hands to grab § 87(2)(b) arm before she could strike the officer in the face. The proximity to PO Nunez's face made her believe it was an intentional attempt to strike by § 87(2)(b). This was the first physical interaction PO Nunez recalled having with § 87(2)(b). She did not know if PO Gargano had initiated physical contact with § 87(2)(b) yet. She did not recall § 87(2)(b) hitting a wall or window or any officers forcing her to hit an inanimate object. § 87(2)(b) continued to resist and fight officers through the handcuffing by moving her arms in various directions around her body which made it more difficult for officers to handcuff her. PO Nunez did not recall if § 87(2)(b) was handcuffed in a standing position or if she was ever taken to the ground.

PO Nunez did not recall preparing a TRI or a need to prepare one. During her interview, she was presented a handwritten version of her own TRI and recognized the handwriting as her own. She stated that despite lack of indication force was used against her by § 87(2)(b) used force as described earlier. She did not know why it was indicated otherwise. She did



not know why it indicated she used a forcible takedown. PO Nunez did not know who transferred the handwritten version to digital. The digital version indicated § 87(2)(b) used force and PO Nunez stated it was accurate and could not explain the disparity with the handwritten version. It also indicated that § 87(2)(b) used no force and PO Nunez stated this field was inaccurate and did not know why (BR 24-25). When presented the above-referenced footage, PO Nunez did not independently recall those specific events and could not explain how § 87(2)(b) got to her stomach. She denied either officer initiating a forcible takedown or believed it was incidental to the restraint because § 87(2)(b) flailed her arms. She nor PO Gargano forced § 87(2)(b) into the wall or window.

The Medical Treatment of Prisoner Report (MTPR) and subsequent medical records indicate § 87(2)(b) § 87(2)(b) for pain and aching in her back as well as for her to receive prescribed medication. No significant injuries or treatment for the back pain were noted.

In determining a reasonable use of force, officers must consider factors including severity of the circumstance, subject's actions, duration of the action, immediacy of the perceived threat or harm to any party, subject's active resistance, subject's attempt of flight to evade arrest, number of subjects and MOS, subject's physical stature, any known violent history, presence of a hostile crowd, and any substance use by the subject at the time NYPD Patrol Guide Procedure 221-01 (BR 26).

Though § 87(2)(b) denied doing anything to resist officers' actions, the video evidence, witness testimony, and officer testimony support the fact she flailed her arms after non-compliance with officers' orders to position herself to be handcuffed. Only officers testified that § 87(2)(b) intended to strike PO Nunez in the face. § 87(2)(g)

§ 87(2)(b) The video evidence shows § 87(2)(b) backing up toward a wall during the initial restraint but it does not depict officers pushing her into the window, and no other testimony apart from § 87(2)(b) those allegations. If officers' actions did cause § 87(2)(b) to hit a window, it was not depicted to be an intentional or excessive use of force. As PO Gargano stated, he took § 87(2)(b) to the ground to present officers a more advantageous position to handcuff a resistant subject. The video evidence and all available testimony do not describe any force excessive to that. The MTPR and medical records do not note any injuries indicating excessive force.

§ 87(2)(g)

**Allegation H – Discourtesy: Police Officer Sorely Nunez spoke discourteously to § 87(2)(b).**

**Allegation I – Discourtesy: Police Officer Sorely Nunez spoke discourteously to § 87(2)(b)**

**Allegation J – Offensive Language: Police Officer Sorely Nunez made remarks to § 87(2)(b) based upon her perceived mental state.**

Footage from PO Nunez's BWC depicts this allegation (BR 03). The durational timestamps of the footage will be referenced, not the onscreen timestamps. At 3:17, PO Nunez requests an ambulance over the radio for an "EDP." At 3:21, as officers handcuff § 87(2)(b) on the ground, PO Nunez tells § 87(2)(b) to, "Calm the fuck down... You tried to fucking punch me, are you crazy?"

§ 87(2)(b) did not raise this allegation in her testimony.

§ 87(2)(b) heard PO Nunez state, after § 87(2)(b) possibly punched her, something along the lines of, "Are you fucking crazy?" § 87(2)(b) did not recall any additional use of profanity by officers. § 87(2)(b) did not recall this allegation, and § 87(2)(b) was not present for this allegation.

PO Nunez recalled that she did not use profanity during the incident. When presented the above-referenced footage, PO Nunez identified herself as issuing the profane statement and

explained she used profanity because she was upset because § 87(2)(b) had just tried to punch her. PO Nunez asked § 87(2)(b) if she was crazy because she was upset and not due to her perceived mental health. The statement was a direct reaction to almost being assaulted.

PO Gargano stated that § 87(2)(b) punched or tried to punch PO Nunez just before this allegation.

Officers are committed to treating every citizen with compassion, courtesy, professionalism, and respect NYPD Patrol Guide Procedure 200-02. An exception to this rule was found when an officer uttered a profanity as an impulsive response to being hit in the head NYPD Disciplinary Case 2013-10143 (BR 15).

Officers are prohibited from using discourteous or disrespectful remarks regarding another person's disability NYPD Patrol Guide Procedure 203-10 (BR 30).

While PO Nunez was not actually hit by § 87(2)(b) she testified to preventing an attempted strike by § 87(2)(b) PO Nunez attributed her subsequent upset and discourteous statements to this attempted assault. Her use of the word "fucking" occurred immediately after the perceived strike and that PO Nunez did not recall making such a statement is consistent with it being an impulsive response. § 87(2)(g)

§ 87(2)(g)

§ 87(2)(g)

However, PO Nunez's subsequent use of the word "crazy" implies insult to § 87(2)(b) and her mental state at the time of the incident, especially given the fact that the officer had just requested an ambulance for § 87(2)(b) being an emotionally disturbed person. § 87(2)(g)

§ 87(2)(g)

§ 87(2)(g)

§ 87(2)(g)

**Allegation K – Discourtesy: Police Officer Sorely Nunez spoke discourteously to § 87(2)(b)**

**Allegation L – Discourtesy: Police Officer Michael Gargano spoke discourteously to § 87(2)(b)**

Footage from PO Nunez's BWC best depicts the allegation of which she is a subject (BR 03). The durational timestamps of the footage will be referenced, not the onscreen timestamps. At 4:02, PO Nunez tells § 87(2)(b) to, "sit the fuck down." § 87(2)(b) is in cuffs on the ground complaining about officers' actions. From 5:19 to 6:15, PO Nunez asks § 87(2)(b) if she is crazy several times because she tried to punch her and tells her she was "throwing shit."

Footage from PO Gargano's BWC best depicts the allegation of which he is a subject (BR 02). The durational timestamps of the footage will be referenced, not the onscreen timestamps. At 4:49, PO Gargano tells § 87(2)(b) "Now you fucked up good. You fucked up good." At 8:48, he tells § 87(2)(b) "You were throwing shit." § 87(2)(b) is in handcuffs throughout. At 11:59, PO Gargano tells § 87(2)(b) "You want to stir shit up," as he escorts her away from the Target via an escalator.

§ 87(2)(b) did not raise these allegations in her testimony.

§ 87(2)(b) and § 87(2)(b) did not recall hearing these allegations, and § 87(2)(b) was not present for this allegation.

PO Nunez recalled no profanity by herself during the incident. When presented the above-referenced footage, PO Nunez identified herself as issuing the profane statement and explained she used profanity because she was still upset because § 87(2)(b) had tried to punch her. PO Nunez asked § 87(2)(b) if she was crazy because she was upset because § 87(2)(b) had tried to punch her, not due to her perceived mental health.

PO Gargano did not recall telling § 87(2)(b) she "fucked up [good]," she was "throwing shit," or that she was "stirring shit up." However, he recalled telling § 87(2)(b) she "amped shit

up.” He only recalled this one use of “shit” by himself. When presented the above-referenced footage, PO Gargano identified himself as stating, “You fucked up, good.” He used profanity because he was having a heated exchange with a resistant subject who had tried to assault PO Nunez. He identified himself as stating, “You were throwing shit,” as he was still amped up after the physical restraint. PO Gargano heard himself state, “You want to stir shit up.” He used profanity because he was still amped up and frustrated and a “little hot” with answering the same questions from § 87(2)(b)

Officers are committed to treating every citizen with compassion, courtesy, professionalism, and respect NYPD Patrol Guide Procedure 200-02. Discourteous language by an officer may also be justified when attempting to gain compliance with an order while attempting to maintain order during a stressful street encounter NYPD Disciplinary Case #79627/04.

At the time of these allegations, § 87(2)(b) was in handcuffs and officers had the situation under control. Though PO Nunez stated she issued her discourteous statements in response to almost being punched, these allegations occurred so much later that it cannot be deemed an impulsive response. § 87(2)(g)

#### **Civilian and Officer CCRB Histories**

- § 87(2)(b)
- PO Gargano has been a member of service for 15 years and has been subject of eight other allegations in five other CCRB complaints with two substantiations (see officer history):
  - 201807436 involved substantiated involved two substantiated allegations of a threat of force and spoken discourtesy. The Board recommended Command Discipline B and the NYPD reported no finding and issued no penalty.
  - 202004227 involves an allegation of a threat of force and 202006294 involves an allegation of a spoken discourtesy and both are pending investigation.
  - § 87(2)(g)
- PO Nunez has been a member of service for six years and has been subject of four other allegations in three other CCRB complaints with no substantiations (see officer history):
  - § 87(2)(g)

#### **Mediation, Civil and Criminal Histories**

- This case was deemed unsuitable for mediation due to § 87(2)(b) arrest.
- On January 4, 2021, the Office of the New York City Comptroller confirmed that no Notices of Claim were filed regarding this incident (BR 28).

• [§ 87(2)(b)] [§§ 86(1)(3)&(4)] [§ 87(2)(c)]

[§ 87(2)(b)] [§§ 86(1)(3)&(4)] [§ 87(2)(c)]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

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Squad No.: 11

Investigator: Benjamin Shelton      Inv. Benjamin Shelton      03/03/2021  
Signature      Print Title & Name      Date

Squad Leader: Edwin Pena      IM Edwin Pena      07/12/21  
Signature      Print Title & Name      Date

Reviewer: \_\_\_\_\_  
Signature      Print Title & Name      Date